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Supreme Court of the United States

OCTOBER TERM, 1957

No. 539

UNITED STATES OVERSEAS AIRLINES, INC., RALPH W. E. COX, JR., R. W. E. COX, LETITIA COX, co-partners doing business as Ocean Air Tradeways; and RALPH COX, JR., LETITIA H. COX, REBEKAH L. MCSWEENEY and ANDREW L. COX, a partnership, doing business under the firm name and style of OCEAN AIR TRADEWAYS,

Petitioners,

against

COMPANIA AEREA VIAJES EXPRESOS DE VENEZUELA, S. A., AEROVIAS VENEZUELA EUROPA and JORGE MARCANO,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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OPINIONS BELOW

The per curiam opinion of the Court of Appeals (Clark, C. J., Chase, J., and Hincks, J.) is reported in 246 F. 2d 951 and is printed as an appendix to this brief (pp. 17-19). The opinion of the District Court (Palmieri, J.) is not officially reported but appears at PA 26-33.*

* References are to the appendices and Exhibits below: "PA": plaintiffs-appellants' appendix; "DA": defendants-appellees' appendix; and "Ex.": Exhibits.

QUESTIONS PRESENTED

1. Whether in conducting a non-jury trial the District Court abused its discretion by its rulings on questions asked on cross-examination of an expert on foreign law.

2. Whether petitioners were prejudiced by the rulings of the District Court.

STATEMENT

Introduction

This action involves a written agreement between respondent Compania Aerea Viajes Expresos de Venezuela (herein called "CAVE"), holder of a franchise for air transportation between Venezuela and Europe, and petitioners. Petitioners agreed to conduct certain flights under the franchise for one year. After only one round trip petitioners decided that they would "make more money" by using their aircraft on the "Korean airlift," necessitated by the Korean conflict. They therefore deliberately breached the agreement.

As a defensive maneuver, petitioners immediately sued for rescission, claiming that defendants had by fraud induced petitioners to contract. Respondent counterclaimed for damages for breach of contract.

The District Court, sitting without a jury, found (PA 5-33) that respondents had committed no fraud that the agreement was valid, and that petitioners ha

willfully breached. Damages of $153,234.53, with interest, were awarded respondents.

Petitioners appealed, asserting a myriad of errors. Respondents also appealed, contending that the damages allowed were insufficient. The Court of Appeals affirmed in a short per curiam opinion, stating that "detailed disposition of these many issues does not seem of wide public interest to others than the immediate litigants" (*infra* p. 17, 246 F. 2d 952).

The Facts

CAVE held and had operated from January, 1950 to May, 1951 a Venezuelan franchise permitting air transportation between Venezuela and Europe (Ex. 357; PA 108-111). However, CAVE found that it had inadequate working capital to conduct the operation itself (PA 111, 148-149), and in May, 1951 determined to sell its aircraft, and seek arrangements for operations through a substantial carrier such as petitioners (PA 108-109; Ex. 357).

From third parties petitioners soon learned of CAVE's need for an operating arrangement (DA 4-5). They had hired two or three former CAVE employees (PA 93), who told petitioners that CAVE's route had a good potential not previously realized because of poor management (DA 74-75, 9-11). Before they had any contact with respondents, petitioners determined that CAVE's route was extremely lucrative (DA 4-11, 111; Ex. C). They then besieged respondents with telephone calls and written communications seeking an agreement (Ex. D, E, F; PA 335).

On July 25, 1951 the parties entered into a written agreement (Ex. N; Appendix A to the petition). By Paragraph 1 of the agreement petitioners agreed, in substance, to conduct flight operations, furnish aircraft and personnel, train Venezuelan personnel as required by Venezuelan law, make certain payments to CAVE, and to "abide by all applicable laws and government regulations."

By Paragraph 2 of the agreement CAVE agreed, in substance, to maintain traffic and landing rights, continue the franchise, further diplomatic relations, and delegate to petitioners primary responsibility "for the hiring, management and termination of all personnel but with the right reserved to CAVE to make final overriding decisions when deemed in the best interests of the Company."

By Paragraph 3 of the agreement it was mutually agreed, in substance, that "matters of policy and questions of major concern relating to the conduct of the operation will be determined and carried out in accordance with properly adopted decisions of the Board of Directors of CAVE," and that the contract would continue for one year.*

After only one round trip petitioners decided that "it didn't look like so much money was going to be made"

* An addition dated August 3, 1951 omitted a paragraph giving petitioners the right to name a member of CAVE's Board of Directors, and provided that, pending approval by the Civil Aeronautics Board of petitioners' director, a Board of Arbitration consisting of the president of CAVE, the president and principal partner of petitioners, and a mutually acceptable third member would settle disagreements as to the operation.

on the operation, and they thought "they would make more money on the Korean airlift" (DA 113). They therefore deliberately and wantonly breached the agreement, telephoning their pilot in Europe to take the aircraft off the operations and strand passengers in Europe (PA 73; DA 59; Ex. 351).

The District Court made detailed findings (PA 5-25) rejecting all claims of petitioners. The Court's opinion stated that "There is no question of the plaintiffs' willful refusal to continue performance under the contract" (PA 29), that "the Korean airlift, necessitated by military actions in Korea, offered the plaintiffs certain prospect of quick profits without comparable risk, and apparently affected the plaintiffs' decision to abandon this enterprise" (PA 27), that CAVE's franchise was valid under Venezuelan law (PA 31), and that respondents were entitled to damages (PA 30-33).

The Trial

Petitioners' contentions at the trial were obvious afterthoughts to escape payment of damages. They attempted to introduce vast amounts of evidence on what the District Court termed "extraneous, cumulative and irrelevant matters" (PA 144-145), and engaged in an "endless exploration of irrelevant minutia" (PA 208). One of petitioners' afterthoughts (not even in the pleadings) was that the agreement between the parties was illegal under Venezuelan law. The Court rejected this argument with careful findings (PA 15-18).

Petitioners' claimed that the agreement was "illegal" because it somehow accomplished a "transfer" to petitioners of "the rights and obligations" of the Venezuelan franchise, in violation of the terms of the franchise and of the Venezuelan Constitution*. The contention was on its face meritless. The agreement gave no franchise rights to petitioners, but made them agents of respondents for certain purposes. CAVE retained the franchise and the right to make "overriding" decisions with respect to the "hiring, management and termination of all personnel" and maintained control over all "matters of policy and questions of major concern relating to the operation" (Ex. N).

Moreover, petitioners made no showing that the operations under the agreement were likely to have been prohibited by the Venezuelan government. Since all governmental powers in Venezuela were vested in the Federal Executive (PA 436, 412), it alone could have prohibited those operations (PA 17). It did not even hint that it would do so. On the contrary, petitioners conducted flights without any interference or question by the government, which was made aware of all the significant terms of the agreement, both in writing (Ex. BL, BM) and orally (PA 432-433). Indeed, with this

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* The petition's misquotation (p. 4) of the franchise, to read "in no event should foreign companies participate in the *enterprise*" (rather than "company"), gives the impression that the franchise prohibited any stock ownership or other participation in CAVE. But the experts for both parties testified, and the franchise manifestly means, that the prohibition against "participation" related only to a company to whom CAVE "transferred" the franchise (PA 267, 270, 421).

awareness, the government renewed CAVE's franchise (Ex. BN) and asked foreign countries for a renewal of landing rights (Ex. BD).* There could be no more explicit or practical construction that the agreement was valid.

Petitioners did not submit the testimony of a Venezuelan lawyer, undoubtedly because they could obtain none to support their contention. Their expert was a Spanish lawyer (PA 256), who had looked up Venezuelan law for the case (PA 258).

Respondents submitted the testimony of a Venezuelan lawyer (PA 408). It is with respect to rulings on the cross-examination of this witness that petitioners now claim that error was committed. Petitioners' chief objection in the Court of Appeals on the point was that the Court sustained an objection to a hypothetical question. Petitioners' counsel had laid no foundation for the question (PA 414-416). The question assumed that the language of the agreement giving CAVE "control" of the management of personnel and matters of policy and major concern was a "sham" (PA 414-415), and asked whether a Venezuelan court would "pierce the sham" (PA 415). The District Court, while indicating that he knew full well that any "sham" could be pierced (PA 414-415), said that no proper foundation had been laid for the hypothetical question, since there was no proof that the retention of control was a sham (PA 415). Petitioners never submitted any proof, either

* The Venezuelan government had also been informed in 1950 of the agreement CAVE had with two other American companies, similar to the agreement with petitioners (PA 446).

through the testimony of their own expert, or in the memorandum of Venezuelan law which the Court permitted their expert to submit (DA 47-48), or otherwise, tending in any way to prove the assumption which petitioners' counsel made.* The Court explained to petitioners' counsel the lack of foundation for the hypothetical question and pointed out that counsel could lay that foundation in one question (PA 415). Yet counsel did not do so.

To say, as the petition does (p. 5), that the District Court sustained "numerous objections" to questions asked on cross-examination, thus "effectively precluding the cross-examination," is inconsistent with the record. Petitioners' counsel's examination of the witness extends over seventeen printed pages (PA 412-428). In this Court the petition does not set forth a single question to which an objection was sustained, but contents itself with tearing from context certain language of the District Court in a colloquy with petitioners' counsel. The substance of the entire statement of the Court, from which language is taken out of context, was that petitioners' counsel was being repetitive (PA 419). To only four questions did petitioners' counsel fail to obtain an answer. Only two such questions were set forth as error in petitioners' brief below, the question above dis-

* Indeed, although the District Court participated actively in the examination of petitioners' expert in an effort to clarify his position, the witness never suggested that the provision for retention of control was inoperative. His position was that, giving effect to all provisions of the agreement, CAVE had "transferred" the rights and obligations of the franchise, leaving CAVE with no substantial rights (PA 277).

ussed and another which was both bad in form and epetitive (PA 424).*

There was no dispute between the parties as to the evidentiary facts on which the question of Venezuelan law turned. There was no controversy as to the terms of the agreement, or the language of the franchise, or indeed any provision of Venezuelan law. Only the conclusion to be drawn by the Court from the uncontroverted facts was in dispute. The day after respondents' expert had testified, petitioners' expert was recalled by petitioners and restated his conclusions at length (PA 490-496). He later reiterated his opinions in his written memorandum (DA 47-48). Yet he never said that the provision in the agreement giving CAVE "control" was a "sham."

The Court of Appeals' Opinion

The per curiam opinion of the Court of Appeals (Clark, C. J., Chase, J. and Hincks, J.), in affirming the judgment, stated that "Since detailed disposition of these many issues does not seem of wide public interest to others than the immediate litigants, we shall rely on the trial judge's extensive findings and opinion for exposition of the facts and content ourselves with merely

* The witness had stated at least six times that, although no transfer of the "rights and obligations of the franchise" could be made to petitioners, no such transfer had been accomplished by the agreement. Petitioners' counsel asked again whether the franchise could "be the subject of an assignment in part" to petitioners (PA 424). The answer was obvious and there was no gain in having the witness state it for a seventh time.

indicating the ground upon which we affirm each point raised by the parties in their respective briefs" (*infra* p. 17, 246 F. 2d 952). The only comment of the Court of Appeals on the issue raised by the petition in this Court was: "the trial court's limitation on cross-examination was not prejudicial" (*infra* p. 18, 246 F. 2d 952).

ARGUMENT

I. The decision below is clearly correct.

The decision below is clearly correct. In the first place, as the Court of Appeals held, the rulings of the District Court could not have been in the slightest degree prejudicial. The belated contention that the agreement was invalid under Venezuelan law was on its face meritless. The significant terms of the agreement between the parties were made known to the Venezuelan government, and by renewing the franchise and seeking renewal of foreign landing rights the Venezuelan government construed the agreement as valid. Even examined theoretically and with hindsight, the agreement is plainly, as the Court of Appeals stated, one of "agency," rather than a "transfer of rights and obligations."

The evidentiary facts on which to base a conclusion as to Venezuelan law being undisputed, the conclusion was one of law for the Court. *Merinos Viesca y Compania* v. *Pan American P. & T. Co.*, 83 F. 2d 240, 242 (2d Cir. 1936) ("It is the duty of the trial judge to use his own judgment and find the meaning of the foreign law as he would if the meaning to be ascer

tained were that of a deed or an agreement"); *Jansson* v. *Swedish American Line*, 185 F. 2d 212 (1st Cir. 1950); *cf. Finney* v. *Guy*, 189 U. S. 335 (1902); *Eastern Bld'g & Loan Association* v. *Williamson*, 189 U. S. 122 (1902). The District Court reached its conclusion and made meticulous findings as to Venezuelan law after consideration of all the undisputed facts, as well as the memoranda of both experts (DA 47, 131-139).* Petitioners have failed to sustain their burden of showing that prejudice resulted. *Palmer* v. *Hoffman*, 318 U. S. 109, 116 (1943). It can hardly be supposed that the Court would have reached a different conclusion if the excluded questions of petitioners' counsel had been answered. See *United States* v. *Borden Co.*, 347 U. S. 514, 516 (1954).

As significant in showing lack of prejudice from the exclusion of evidence, the cases point to factors such as: that the appellants' expert could testify to the facts and opinions in issue, *Frank R. Jelleff, Inc.* v. *Brazen*, 233 F. 2d 671 (D.C. Cir. 1956), that the objecting party was allowed to submit a brief setting forth its conclusions, *Cintron Riviera* v. *Bull Insular Line*, 164 F. 2d 88, 91 (1st Cir. 1947), and that the trial judge, sitting without a jury, indicated that he would attach little weight to the excluded testimony, *Mutual Life Ins. Co. of New York* v. *Frost*, 164 F. 2d 542 (1st Cir. 1947). All these factors were present in this case. It is incon-

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* The statement in the petition (p. 5) that the District Court "relied solely" upon the testimony of defendants' expert witness as to Venezuelan law is inaccurate, as a reading of the findings will show (PA 15-18).

ceivable that any prejudice occurred to petitioners. To inflict on respondents "the monstrous penalty of a new trial," 1 Wigmore, Evidence, 3d Ed. 1940, §21, on the basis of this record would be unfair in the extreme.

In addition, as set forth above, the rulings of the District Court were with respect to questions which were patently improper. A District Court has, particularly in a non-jury case, wide discretion in the conduct of the trial and the extent of the cross-examination. Cf. *Glasser* v. *United States*, 315 U. S. 60, 83 (1942) (criminal case); *Burns* v. *United States*, 287 U. S. 216, 222-223 (1932) (same). In a non-jury case, where the evidentiary facts are not in dispute and where the trial court has the benefit of written memoranda setting forth the opposing conclusions of the witnesses as to foreign law, it would be strange to withhold discretion from the District Court in controlling the examination of those witnesses. A reading of the examination in question demonstrates that the District Court acted well within sound discretion (PA 408-428).

II. There is no important question of federal law.

Petitioners claim (p. 7) that in the individual facts of this litigation there lurks an important question of federal law, namely, the permissible scope of cross-examination of technical experts. No such question is involved. The decision of the Court of Appeals was merely that the District Court's rulings were not "prejudicial." Surely the determination that in the particular circumstances of this case no prejudice occurred to peti-

tioners presents no important question of federal law which requires resolution by this Court. The Court of Appeals' opinion as to lack of prejudice is hardly a precedent in any other case.

The petition attempts to analogize this litigation to cases involving technical matters susceptible of proof only through physicians, engineers or scientists (p. 9). There is no fair analogy, for in such cases the litigation hinges on conclusions which only a scientific or medical expert can draw. Here, there was no dispute as to any relevant fact, document or provision of Venezuelan law, and the question was not one of fact at all, but rather one of law, which the Court was required and fully competent to decide.

Finally, even if the question asserted by the petition had been presented, there is no indication that the federal courts are in doubt as to its answer. The extent of cross-examination must inevitably be largely within the discretion of the trial court if there is to be a fair administration of justice. The Court of Appeals for the Second Circuit has not indicated any propensity to allow the District Courts in that circuit to depart from those criteria which have long been followed in the federal courts as marking the permissible limits of that discretion.

III. There is no conflict of decision.

The petitioners assert (p. 12) that the decision below is "in a way in conflict" or "in apparent conflict" with four cases. A reading of those cases shows that no conflict is presented. *Alford* v. *United States*, 282 U. S.

687 (1931), was a criminal case in which a witness gave key testimony as to uncorroborated conversations, yet cross-examination to discredit the witness before the jury and to show where he resided and that he was in custody of federal authorities was cut off. *Fisher* v. *United States*, 231 F. 2d 99 (9th Cir. 1956) was also a criminal case where the witness, offered as an "expert" on Communism, gave critical testimony that he had seen defendant at a Communist meeting. The trial court did not allow cross-examination to show bias because of payment for the testimony or to show prior false identifications of Communists. *Carter Products* v. *Federal Trade Comm'n*, 201 F. 2d 446 (9th Cir. 1953), vacated on other grounds, 346 U. S. 329 (1953), was a case where a Federal Trade Commission examiner so unfairly restricted cross-examination of doctors who testified for the Commission as to foreclose any "inquiry into matters bearing materially" on crucial direct testimony. For example, a doctor was qualified as a gastroenterologist and radiologist and gave testimony in both capacities on direct. The examiner restricted the cross-examination to questions on radiology and yet refused to strike the testimony on direct pertaining to gastroenterology. *United States* v. *Augustine*, 189 F. 2d 587 (3d Cir. 1951), involved a prosecution for income tax evasion. There the cross-examination of a "devastating" witness as to "the heart of the case" for the prosecution was so restricted that there could be no exploration of the witness' credibility on the critical point of the case.

Conclusion

The issues involved in this litigation lay bare no considerations which in the exercise of discretion would warrant the granting of a petition for certiorari under the Court's Rule 19. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Before:

CLARK, *Chief Judge*, and
CHASE and HINCKS, *Circuit Judges*.

Per CURIAM:

This appeal involves the interpretation and validity of a written agreement made by the parties covering air carrier operations. Plaintiffs were nonschedule carriers and the owners and operators of aircraft, two of which were to be used under the agreement for the purpose of exploiting a franchise held by defendant CAVE from the Venezuelan Government for trans-Atlantic flying. In this action brought in a federal court because of the diverse citizenship of the parties, both litigants claimed breach of the agreement. Judge Palmieri, sitting without a jury, made findings holding defendants entitled to damages because of plaintiffs' breach, but declining to give defendants as large a judgment on their counterclaim as they had sought. Both sides appeal, raising a variety of questions, including fraud, invalidity, and damages. We agree with the judge's disposition of the issues, although we do not adopt all his reasons. Since detailed disposition of these many issues does not seem of wide public interest to others than the immediate litigants, we shall rely on the trial judge's extensive findings and opinion for exposition of the facts and content ourselves with merely indicating the ground upon which we affirm each point raised by the parties in their respective briefs.

1. *Discussing USOA's Points of Law.* (1) The findings as to lack of fraud and lack of reliance thereon by USOA are not clearly erroneous; (2) the contract was not illegal

because it was an agency contract, rather than a "transfer of rights and obligations"; (3) the trial court's limitation on cross-examination was not prejudicial, and the other evidentiary rulings were correct; (4) there was sufficient evidence to support findings that CAVE was not in breach when USOA breached, and CAVE remained ready and willing to perform subsequently—its only duty under New York law, *DeForest Radio Telephone & Telegraph Co.* v. *Triangle Radio Supply Co.*, 243 N. Y. 283, 153 N. E. 75; (5) since the option to purchase plaintiffs' aircraft was not a remedy, it was not the exclusive remedy for breach. Nor was there an election of one remedy or a forfeiture of others on these facts. We agree with the trial judge's construction of the minimum guarantee of $3,000 per week as applicable, whether or not USOA chose to continue flights. There could be anticipatory breach of this contract under New York law because it was one for the payment of money, as well as for the performance of services; and USOA concedes the propriety of finding anticipatory breach of contracts to pay money. The award of damages to defendants, based on this minimum guarantee, plus out-of-pocket expenses and less a small offset for nonperformance by defendants of a collateral agreement, is therefore justified.

2. *Discussing CAVE's Affirmative Points of Law*: (1) CAVE failed to carry its burden of showing that it was ready and willing to perform its part of the option contract to purchase the aircraft, and consequently it cannot obtain damages for USOA's anticipatory repudiation. 4 Corbin on Contracts §§962, 977, 978 (1951). (2) CAVE also failed to meet its burden of proving that USOA's breach was the proximate cause whereby it lost its franchise. The Venezuelan Government explained the loss in

terms of nonflying and noncompliance "with the requirements stipulated by the National Technical Board of Aeronautics, in connection with the application of • • • [CAVE] to operate international air transportation services." These requirements were neither explained nor linked to USOA's breach. Consequently the court's refusal to award CAVE damages based on these items was not error.

Affirmed.